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## Interim Measures in Greek Competition Law

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### I. INTRODUCTION

The provisions on interim measures of Greek competition law have been the object of much debate and legislative change over the last several years. The evolution and modernization of the relevant legal regime have made their application more effective, harmonized them with the relevant provisions of EU law, and allowed the Hellenic Competition Commission to address risks to competition more effectively.

This article is organized as follows: the first section provides a brief description of the legislative evolution of interim measures in Greek competition law; the second section interprets the notion of “public interest” as the object of protection and examines the conformity of this legislative choice with EU law; the third section provides an overview of the recent case-law of the Hellenic Competition Commission; and the last section concludes.

### II. LEGISLATIVE EVOLUTION OF INTERIM MEASURES

#### A. Law 703/1977

Until August 2005, when Law 3373/2005 entered into force, interim measures were regulated by Article 9 par. 4 of Law 703/1977, as amended by Law 2296/1995. Pursuant to this provision:

The Competition Commission is exclusively competent to take interim measures either ex officio or following a request of a person who has made a complaint, according to article 24 of this law, or following a request of the Minister of Commerce, when a violation of articles 1, 2 and 2a of this law<sup>2</sup> is presumed and there is urgency for the prevention of imminent risk of irreparable harm to the person filing such request or to the public interest.

From the unambiguous wording of this provision it can be concluded that:

1. The Hellenic Competition Commission (“HCC”) is exclusively competent to take interim measures;
2. Private persons (in addition to the HCC and the competent Minister) are entitled to file a relevant request with the HCC, provided they have already made a relevant complaint for those violations of competition law;
3. Both the public and the private interest are protected; and

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<sup>2</sup> Article 1 of Law 703/1977 was the equivalent of Article 101 TFEU, whereas Article 2 of Law 703/1977 was the equivalent of Article 102 TFEU. Article 2a of Law 703/1977 (now transferred to Law 146/1914 on unfair competition) concerned abuses of economic dependency by strong (albeit not necessarily dominant) undertakings.

4. The possibility of requesting interim measures for violations of European competition law is not (at least explicitly) provided.

Based on the aforementioned provision, from 1995 until the amendment of Law 703/1977 in 2005, the HCC ruled on approximately 49 requests for interim measures, of which 48 were filed by private persons and 1 by the competent Minister; the HCC took no initiative *ex officio*. Of these requests only 6 were accepted by the HCC.

### **B. Law 3373/2005**

A major change of the legislative regime of interim measures in Greek competition law came about in 2005, when law 3373/2005 entered into force.

According to Article 16 of Law 3373/2005, article 9 par. 4 of Law 703/1977 was amended as follows:

[5.]The Competition Commission is exclusively competent to take interim measures either *ex officio* or following a request of the Minister of Development, when a violation of articles 1, 2, 2a and 5 of this law<sup>3</sup> or articles 81 and 82 EC Treaty is presumed and there is urgency for the prevention of imminent risk of irreparable harm to the public interest

As clearly concluded, a major change introduced by Law 3373/2005 was that private persons were no longer entitled to request the HCC to take interim measures, and the private interest—as opposed to the public one—was no longer an object of protection. Furthermore, the competence of the HCC to take interim measures for violations of EU competition law was explicitly acknowledged, as Council Regulation 1/2003<sup>4</sup> had already entered into force, while interim measures could now also be taken in cases of regulatory intervention in sectors of the economy.

This change, which in effect abolished the right of private persons to request the HCC to take interim measures and determined the public interest as the only object of protection, was primarily aimed at relieving the HCC of a vast workload of essentially private disputes, in order to allocate its resources to more important cases affecting the public interest.

Nevertheless, this change of law also sparked debate as to the correct interpretation of the new provision and its conformity with the Greek Constitution, the TFEU, and the European Convention of Human Rights. The main cause of concern was that the wording of this provision, criticized as “vague,” allowed the interpretation that the HCC was the only body competent to take interim measures in competition law, *even to the exclusion of courts* (civil or administrative), and, therefore, that private persons had no right whatsoever to interim relief. Consequently, if

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<sup>3</sup>*Id.* Article 5 of Law 703/1977 concerned the regulatory intervention in sectors of the economy. Upon request by the Minister of Development or *ex officio*, the HCC may examine a specific sector of the Greek economy and, if it confirms that the conditions for effective competition do not exist in said sector and the application of articles 1, 2, 2a and 4 ff. does not suffice for the creation thereof, it may, by virtue of a justified decision, take any measure of conduct or structure for the creation of conditions of effective competition in that specific sector of the economy.

<sup>4</sup> Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1–25.

this was the true interpretation of the provision, private persons were no longer effectively protected against violations of competition law.<sup>5</sup>

The prevailing opinion in this debate, according to the caselaw,<sup>6</sup> the literature,<sup>7</sup> and a relevant notice of the HCC,<sup>8</sup> was that private persons cannot be lawfully deprived of the right to seek interim relief for violations of competition law and thus civil courts should have competence to order interim measures for the protection of private rights. Besides, Art. 9 par. 5 of Law 703/1977 was essentially a procedural rule and not a provision of substantive law establishing rights or defining their subject; it did nothing more than determine the competence for interim measures when the public interest was at stake and such competence lied with the HCC. This did not, however, mean that private rights were not protected by competition rules, or that private persons harmed by violations thereof were deprived of the right to effective judicial relief, including interim measures. Consequently, according to the prevailing opinion, private persons were entitled to request interim measures from civil courts for violations of competition law, which put their legitimate interests at risk of irreparable harm.

### C. The Current Regime: Law 3959/2011

This debate on the rights of private persons to request interim measures against undertakings for violations of competition law, was finally resolved by Law 3959/2011, which abolished and replaced Law 703/1977 and is currently in force.

Pursuant to par. 5 of Article 25 of Law 3959/2011:

The Competition Commission is exclusively competent to take interim measures either *ex officio* or following a request of the Minister of Economy, Competitiveness and Shipping, when a violation of articles 1, 2 and 11<sup>9</sup> or 101 and 102 TFEU is presumed and there is urgency for the prevention of an imminent risk of irreparable harm to the public interest.

The Competition Commission may threaten with the imposition of a fine amounting up to EUR 10,000 for each day of non-compliance with its decision, and impose such fine by a decision certifying the non-compliance. For the calculation of the fine, the benefits received by the undertaking and the effects of non-compliance in the relevant market are taken into account.

Within 15 days the latest as from the submission of a request by the Minister of Economy, Competitiveness and Shipping, the Competition Commission is obliged to issue a decision, after hearing the parties. This decision is only subject

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<sup>5</sup> In fact, the “exclusive competence” of the HCC to order interim measures existed even under the previous regime (i.e. the old provision of Art. 9 Law 703/1977); however, the debate on the interpretation of the term was limited, since, even if the competence of courts was not acknowledged, private persons still had a right to interim relief through the HCC.

<sup>6</sup> Indicatively, judgment No. 4027/2007 of the Athens Court of First Instance.

<sup>7</sup> Indicatively, Babetas Georgios, Aspects of the new institution of interim measures within the frames of L. 703/77, *Chronicles of Private Law* 2006, p. 197 et seq.

<sup>8</sup> HCC Notice on Interim Measures dated 24.10.2005, *available at*: [www.epant.gr/img/x2/categories/ctg251\\_3\\_1193315341.pdf](http://www.epant.gr/img/x2/categories/ctg251_3_1193315341.pdf).

<sup>9</sup> Article 1 of Law 3959/2011 is the equivalent of Article 101 TFEU, whereas Article 2 of Law 3959/2011 is the equivalent of Article 102 TFEU. Article 11 of Law 3959/2011 concerns regulatory interventions in sectors of the economy. *Supra* note 3.

to appeal before the Athens Administrative Court of Appeals. The provisions of paras. 2, 3 and 4 of Art. 30 apply *mutatis mutandis*.

The provisions of the present paragraph do not affect the competence of civil courts to order interim measures for the protection of private interests.

Thus, the current provision explicitly acknowledges that private interests are also protected by competition law and, thus, private persons at risk of irreparable harm by violations thereof are entitled to seek injunctive relief in civil courts. Consequently, under the current regime, both the HCC and the civil courts have competence to order interim measures, depending on whether the public or the private interest is at stake. Accordingly, the object of interim measures ordered by each of these bodies will be different:

- The HCC decision shall order the provisional cease of the anticompetitive behavior presumed, its effects shall be valid against any third party and may be invoked respectively by any third party, and it shall be legally considered an individual administrative act;
- The judgment of the court shall not (and cannot) order a general and valid-against-all cease of the anticompetitive behavior presumed, but shall order those measures which it deems necessary for the protection of civil rights of the particular claimant; in essence, the court will order a *in natura compensation* of the claimant by the plaintiff, which will essentially consist in the cease of the anticompetitive behavior against the former.

## II. INTERPRETATION AND EVALUATION OF THE CURRENT PROVISION IN FORCE

### A. *The Notion of Public Interest*

The unambiguous wording of Article 25 par. 5 Law 3959/2011 has made it clear that the HCC is exclusively competent to order interim measures when the public interest is at risk, while civil courts are competent to order interim measures when the private interest is at risk. Nevertheless, this provision does not provide guidance on the criteria pursuant to which the “public interest” is distinguished from “private interest.”

According to the HCC Notice on Interim Measures,<sup>10</sup> “the term ‘public interest’ coincides with the protection of competition as an institution.” Consequently, interim measures of Law 3959/2011 cannot be ordered for protecting any aspect of the “public interest” whatsoever (e.g. protection of public health or protection of environment), but only for that aspect which concerns the safeguarding of effective competition and the prevention of behaviors which could impair it to the detriment of consumers.

In this sense, the risk of irreparable economic damage to one undertaking is not in itself sufficient for a finding of “damage to competition,” but risk of irreparable damage to the market structure must be established, in a way that the economic freedom of existing and potential market players is unlawfully restricted.

However, if the application of competition rules is to be effective, “competition as an institution” should not be addressed as a theoretical notion, especially since the public interest

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<sup>10</sup>*Supra* note 8.

effectively consists of numerous individual private interests. Therefore, the risks of damage to individual undertakings should be also taken into account for the assessment of damage to “competition as an institution” and not be *a priori* rejected as not qualifying for interim protection by the HCC. Consequently, if all, or most of, the undertakings participating in a certain market are at risk of being harmed by a certain anticompetitive behavior, then the very structure of the market and hence the public interest should be presumed to be at risk as well.

### **B. Assessment of Art. 25 Par. 5 Law 3959/2011 According to EU Law**

As described in detail under I.C above, the HCC is competent to order interim measures in cases of urgency, when a violation of competition rules makes necessary the prevention of an imminent risk of irreparable damage to the public interest.

Respectively, Article 8 of Council Regulation 1/2003 provides that “In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a *prima facie* finding of infringement, order interim measures.” In this aspect the national provision of Law 3959/2011 appears to be consistent with the EU provision: In both cases, the object of protection is the public interest, i.e. competition,<sup>11</sup> urgency, and risk of irreparable damage thereto is required, and no private undertaking can make a relevant request to the Commission, which acts “on its own initiative.”

The only aspect that appears to be in essence different than the national provision is that Article 8 of Council Regulation 1/2003 additionally requires that the damage is “serious” and not solely “irreparable.” Nevertheless, this discrepancy does not necessarily mean that the national provision deviates from Council Regulation 1/2003, especially since this condition is required when the European Commission orders interim measures and not *national* competition authorities (“NCAs”). Besides, Article 5 of the same, which specifically concerns the powers of NCAs, does not determine such (or any for that matter) requirement, but allows Member States to determine them in their national law.<sup>12</sup> Consequently, in this aspect, the national provision does not appear to contravene EU law.

Furthermore, Art. 25 of Law 3959/2011 provides that private persons are entitled to request interim measures by civil courts, when a violation of competition rules creates an urgent and imminent risk of irreparable harm to their legitimate interests. Also in this aspect, the national provision appears to be consistent with Council Regulation 1/2003: Recital (7) thereof provides that “National courts have an essential part to play in applying the Community competition rules. (...) The role of the national courts here complements that of the competition authorities of the Member States,” whereas Article 6 explicitly provides that “National courts shall have the power to apply Articles 81 and 82 of the Treaty.”

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<sup>11</sup> In this aspect, *see also* COM(2000) 582 final, “Proposal for a COUNCIL REGULATION on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87,” under Article 8, p. 18.

<sup>12</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC OJ C 101, 27.4.2004, p. 55, par.9. “The procedural conditions for the enforcement of EC competition rules by national courts and the sanctions they can impose in case of an infringement of those rules are largely covered by national law. (...)”

Besides, the European Commission has explicitly acknowledged that both competition authorities and courts should apply competition rules, albeit by adopting a different role:

The Commission acts in the public interest and not in the interest of individual operators. It is therefore appropriate to ensure that the Commission has an obligation to adopt interim measures only in cases where there is a risk of serious and irreparable harm to competition. Companies can always have recourse to national courts, the very function of which is to protect the rights of individuals.<sup>13</sup>

It therefore results that the provision of Art. 25 of Law 3959/2011, in allowing private persons to resort to civil courts for interim relief in case of competition law violations is consistent with EU Law. In fact, any national rule to the contrary would violate EU Law and would thus remain inapplicable as explicitly ruled by the Court of Justice of EU:

(...) the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court, which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.<sup>14</sup>

In view of the foregoing, it can be concluded that overall the current national regime on interim measures is compliant with EU law.

### III. OVERVIEW OF RECENT HCC CASELAW

An overview of the HCC caselaw from 1995 until today not only reflects the general practice of the HCC on interim measures but also the practical effects of the aforementioned legislative changes on interim relief. Accordingly, four basic conclusions may be drawn:

1. The HCC decisions actually ordering interim measures are rather scarce: from 59 decisions issued since 1995, only 9 ordered interim measures; of those 9 decisions, 3 were issued following an *ex officio* investigation by the HCC;
2. The most common grounds for rejecting relevant requests concerned the “lack of urgency” or “imminent risk;”
3. The change in law in 2005, which abolished the right of private persons to request interim measures from the HCC, dramatically reduced its workload: 49 out of those 59 decisions were issued before 2005, of which 48 were filed by private persons; of those 49 decisions only 6 actually ordered interim measures; and
4. The application of the relevant provisions by the HCC throughout the years appears to be generally consistent both with the national and the EU case law.

Despite the fact that the HCC does not generally appear too enthusiastic about ordering interim measures, when it actually does so, its decisions are well established and particularly interesting—especially those issued after the change in law in 2005. In this aspect, specific

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<sup>13</sup>*Supra* note9.

<sup>14</sup> Case C-213/89. *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*. EUROPEAN COURT REPORTS 1990, Page I-02433, at 21.

reference should be made to two recent decisions, namely decision No. 505/VI/2010 on flourmills and decision no. 545/VIII/2012 on infant milk, both due to their thorough legal analysis and the effects they achieved.

#### ***A) The Decision on Flour Mills (HCC Decision No. 505/VI/2010)***

This case concerned two “recommendations” issued in August 2010 by two associations of undertakings active in the flour market, namely the “Greek Flour Millers’ Association” and the “Association of Flour Mills of Greece,” which together represented approximately 90 percent of flour mills in Greece. Each of these associations issued a press release and made several public statements, according to which their members were invited to increase the prices for flour by 30 percent approximately, allegedly due to a recent rise in the wheat costs.

The HCC initiated an *ex officio* investigation and shortly after the competent Minister also requested the HCC intervention. Following the HCC investigation and its report, which largely concluded that interim measures should be adopted, the two associations appeared before the HCC during the hearing of the case and offered commitments pursuant to Article 9(1)(e) and Article 9(7) L.703/1977. These commitments consisted in the withdrawal of the crucial press releases and announcements, the notification of such withdrawal and to their members and the press, and the abstinence from any similar announcement or recommendation concerning the commercial and pricing policy of its members.

By its decision No. 505/VI/2010, the HCC accepted the aforementioned commitments and made them binding on the parties.

#### ***B. The Decision on Baby Milk (HCC Decision 545/VIII/2012)***

The baby milk case is particularly interesting due to the effectiveness of the HCC initiative: the HCC managed to prevent the “imminent risk of damage to competition” even before the issuance of a decision, as the parties to the presumed infringement recalled all their anticompetitive decisions shortly after they received the report of the HCC Rapporteur.

The case concerned the Pharmacists Association of Achaia as well as pharmaceutical warehouses—wholesalers active in the area of Western Greece, which, despite the abrogation of the regulation requiring the sale of formulas for infants under 6 months solely in pharmacies, adopted a decision which was aimed at maintaining the sale of these formulas exclusively through pharmacists. In particular, in its General Meeting dated March 20, 2012, the Pharmacists Association of Achaia decided that: i) its members would not sell infant milk of certain producers, which were known to supply their products also through the retail channel; ii) its members would return the products of said boycotted companies; and iii) it would closely monitor the compliance of certain companies who were exclusively supplying their products to pharmacies.

In its decision, the HCC explained the reasons why interim measures appeared appropriate on this case and emphasized the risk of such practices to the public interest, which consisted, among others, in the unrestricted supply of products necessary for public health, especially concerning the particularly sensitive category of health of infants. However, as mentioned above, shortly after the parties involved received the HCC Report on the case, the Pharmacists Association of Achaia recalled the crucial decision and notified such recall to the



press, its members, the producers of infant milk who had received the decision, and the other pharmacist associations, and also posted it on their site. Furthermore, some other associations and companies also involved in the decision made similar recalls.

In view of these actions, the HCC held that the imminent and urgent risk to the public interest had been prevented and the only action it consequently took was to order the parties to abstain from any similar practices and threaten them with a fine for failure to do so, until the issuance of the decision on the merits.

#### IV. CONCLUSIONS

Interim measures in Greek competition law have been the object of much debate and legislative change over the last decades. One of the particularities of interim measures in this field of law is associated with the coexistence of public and private enforcement since, inevitably, violations of competition law may affect both the public interest and private rights. Consequently, one of the issues that the national legislator was obliged to address was the effective allocation of jurisdiction for competition violations according to their nature, effects, and risks of damage.

While the initial national provision (Art. 9 par. 4 Law 703/77) determined that the HCC was competent to rule both on private disputes and competition violations affecting the public interest, the amendment introduced by Law 3959/2011 abolished the competence of the HCC to rule on private disputes. Subsequently, Art. 25.5 of Law 3959/2011, which replaced Law 703/1977 and is the provision currently in force, confirmed the exclusive competence of the HCC to order interim measures for violations affecting the public interest and, for the first time, explicitly acknowledged the competence of civil courts to order interim measures for competition violations affecting private rights.

Overall, the current regime of Law 3959/2011 on interim measures should be deemed successful, since: 1) it is in line with the relevant EU provisions and Council Regulation 1/2003 in particular; 2) it has succeeded in relieving the HCC from a vast workload of essentially private disputes; 3) it put an end to the debate on the judicial protection of private persons for violations of competition law; and 4) it has led to the issuance of effective decisions in the last years that have succeeded in the timely prevention of risks to competition in market sectors of particular importance.